Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ELBERT HATCHETT AND
LAURENSTINE HATCHETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court in *Hatchett v. United States,* 330 F.3d 875 (6th Cir. 2003),held that, inter alia, the Internal Revenue Service had the power to sell not only the delinquent taxpayer's interest in entireties property, but also the entireties property itself, including the nontaxpayer's interest in the entireties property, in an administrative levy action. This holding raises the following substantial tax issues that warrant review by this Court:

1. The *Hatchett* decision disregarded this Court's decision in *United States v. Rodgers,* 461 U.S. 677, 696 (1983) ("Under 26 U.S.C. § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt property and rights to property . . . belonging to such person," i.e. the delinquent taxpayer [emphasis by the Court; internal quotation marks omitted]); disregarded the plain language of the Internal Revenue Code, and created an intolerable conflict between the circuits on an important federal issue of widespread importance with *O'Hagan v. United States*, 86 F3d 776 (8th Cir. 1996) and *National Bank & Trust Co. of South Bend v. United States,* 589 F.2d 1298, 1303 (7th Cir. 1978), regarding whether the Government may sell property of a nontaxpayer in an administrative levy.

2. The Sixth Circuit's decision in *Hatchett* "departed from the accepted and usual course of judicial proceedings" by misinterpreting the plain language of § 6331, this Court's consistent holdings dating back at least far as *Mansfield v. Excelsior Refining Co.*, 135 U.S. 326, 10 S.Ct. 825, 34 L.Ed. 162

(1890), and the Government's own Motion to Amend Opinion which requested that the Sixth Circuit delete its holding that the Internal Revenue Service may sell both a delinquent taxpayer's interest in entireties property and a non-taxpayer's interest in entireties property in an administrative levy action.

RULE 14.1(b) AND 29.6 STATEMENT

The parties in the Court of Appeals were Petitioners Elbert and Laurestine Hatchett, husband and wife, and the United States, on behalf of the Internal Revenue Service. None of the parties are corporate entities.

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The underlying decision by the Court of Appeals for the Sixth Circuit which reversed the District Court is reported at 330 F.3d 875 (6th Cir. 2003)(App., *infra,* 1a). The decision of the Court of Appeals for the Sixth Circuit denying the petition for rehearing and suggestion en banc is not reported (App., *infra,* 23a). The decision by the District Court for the Eastern District of Michigan is reported at 126 F.Supp.2d 1038 (E.D. Mich. 2000)(App., *infra,* 24a). The Government's own Motion to Amend Opinion is also set forth in the appendix. (App., *infra,* 51a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 2003. (App., *infra,* 1a). A timely petition for rehearing was denied on September 30, 2003 (App., *infra,* 23a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

26 U.S.C. § 6331, the Administrative Levy Statute, which the Sixth Circuit in the instant case held to authorize the sale of both the taxpayer's interest in entireties property and the non-taxpayer's interest in the entireties property, provides in pertinent part:

> **"CHAPTER 64--COLLECTION**
> **SUBCHAPTER D--SEIZURE OF PROPERTY FOR COLLECTION OF TAXES**
> **PART II--LEVY**
> **§ 6331. Levy and distraint(a) Authority of Secretary**.–...it shall be lawful for the Secretary to collect such tax...by levy upon **all property and rights to property** (except such property as is exempt under section 6334) **belonging to such person** or on which there is a lien provided in this chapter for the payment of such tax. [emphasis added]"

26 U.S.C. § 6335, also relied upon by the Sixth Circuit, states:

> **"CHAPTER 64 – COLLECTION**
> **SUBCHAPTER D--SEIZURE OF PROPERTY FOR COLLECTION OF TAXES**
> **PART II--LEVY**
> **§ 6335. Sale of seized property**
> ...(c) Sale of indivisible **property.--If any property liable to levy** is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.[emphasis added]"

26 U.S.C. § 7403, the Judicial Foreclosure Statute, which could authorize the sale of the entireties property itself **in a judicial foreclosure proceeding,** provides:

> **"CHAPTER76--JUDICIAL PROCEEDINGS**
> **§ 7403. Action to enforce lien or to subject property to payment of tax**
> (a)...the Attorney General...may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States...to subject any property, of whatever nature, of the delinquent, **or in which he has any right, title, or interest**, to the payment of such tax or liability.
> (b) Parties.--All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.
> (c) Adjudication and decree.--The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and...may decree a sale of such property...and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. [emphasis added]"

STATEMENT OF THE CASE

A. The Government may only sell the delinquent taxpayer's interest in entireties property pursuant to the Administrative Levy Statute, and if it wants to sell the non-taxpayer's interest in the entireties property, it must proceed under the Judicial Foreclosure Statute which provides the non-taxpayer with judicial oversight and due process protections not found under the Administrative Levy Statute.

The Internal Revenue Code provides two distinct collection tools for the collection of delinquent taxes; the administrative levy of 26 U.S.C. § 6331, and judicial foreclosure proceedings under 26 U.S.C. § 7403. *See United States v Rodgers*, 461 U.S. at 682.

The Judicial Foreclosure Statute, 26 U.S.C. § 7403(a) of the Internal Revenue Code, provides for civil enforcement of a Governmental lien and allows the Government "to subject any **property**, of whatever nature, **of the delinquent (taxpayer)**, **or in which he has any right, title, or interest**, to the payment of such tax or liability." It requires the filing of a judicial proceeding in which "[a]ll persons having liens upon or claiming any interest in the property involved" be made parties. 26 U.S.C. § 7403(b).

Administrative levy under 26 U.S.C. § 6331 is the quicker, and more drastic of the Government's two primary collection tools. *See Bull v. United States,* 295 U.S. 247, 259-260, 55 S.Ct. 695, 699-700 (1935). By allowing the Government summarily to seize and sell "all property and rights to property ... belonging to [the delinquent taxpayer]," 26 U.S.C. § 6331(a), the Administrative Levy Statute permits

the IRS to collect unpaid taxes **without judicial intervention.** It is a "summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims." *United States v. Sullivan,* 333 F.2d 100, 116 (3rd Cir. 1964). It provides no notice to third parties that property in which they may have an interest has been seized. If an individual discovers a levy and believes that it was wrongful, her only recourse is to seek administrative review under 26 U.S.C. § 6343(b) within nine months or to file suit in federal district court under 26 U.S.C. § 7426(a)(1) within the same amount of time. Section 6532(c)(1) requires third parties who are not seeking administrative review to file suit within nine months of the levy.

The language of these two provisions reveals the critical difference between them. While The Administrative Levy Statute, §6331, applies to "**property and rights to property ... belonging to [the delinquent taxpayer]**," § 7403 applies to "**property ... in which [the delinquent] has any right, title, or interest ...**,". In other words, § 6331 permits seizure and sale of property or property rights belonging to the delinquent taxpayer, while § 7403 allows the Government to seize and sell any property in which the delinquent taxpayer has an interest--even a partial interest. In many situations, this difference is unimportant. This case is not one of them, however. The *Hatchett* opinion allows the Government to administratively levy or sell Mr. Hatchett's interest in the entireties property, which would be proper. It also allows the Government to sell Mrs. Hatchett's interest in the entireties property, to sell the entireties property itself, including the marital home, in a summary process without the benefit of the due process protections of a Judicial Foreclosure. This holding is inconsistent with this Court's jurisprudence dating back to at least 1890, unanimous Circuit and District Court

cases, the plain language of the Internal Revenue Code, and the Government's own position which led to their filing a Motion to Amend Opinion requesting that the Sixth Circuit delete provisions in the *Hatchett* opinion indicating that they would be allowed to levy on the entireties property itself without commencing a judicial foreclosure action (App., *infra*, 51a).

Until the Sixth Circuit's decision in *Hatchett,* the Supreme Court, the Courts of Appeal and the District Courts have faithfully followed this interpretation of the levy and foreclosure provisions for the past century which is required by the plain language of the Administrative Levy Statute and the Judicial Foreclosure Statute. In *Hatchett*, however, the Sixth Circuit held: "the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to § 6335(c)." (App., *infra,* 14a)

B. Factual Background

In this case, the Internal Revenue Service assessed the taxpayer, Elbert Hatchett, for more than $6.6 million in federal income taxes and penalties for the tax years 1975 to1991. Though the existence and amount of the delinquency is at issue in the trial court, it is not at issue for purposes of this Petition. To collect the delinquent taxes, pursuant to the Administrative Levy Statute, the IRS levied against four parcels of real estate, including the marital home, owned by Mr. Hatchett and his wife, Laurestine Hatchett, as tenants by the entirety, or solely by Mrs. Hatchett, on October 24, 1994, **scheduling a public auction tax sale one month later**, on November 30, 1994. Additionally, the IRS levied on mortgage payments due to the Hatchetts from another property previously owned by the Hatchetts as tenants by the entirety and sold by the Hatchetts to another couple in 1991.

Mr. and Mrs. Hatchett then commenced the instant wrongful levy action, seeking to enjoin the administrative levy tax sale of the four parcels of real estate and the seizure of the mortgage payments.

The District Court entered summary judgment in favor of Mr. and Mrs. Hatchett as to three of the four properties and the mortgage payments. In granting summary judgment in favor of the Hatchetts, the District Court relied in part upon the Sixth Circuit's first decision in *United States v. Craft*, 140 F.3d 638 (6th Cir. 1998), and held that the government was not entitled to levy on property held in a tenancy by the entirety. In June 2000, the government filed an appeal. Then, in 2002, this Court reversed the Sixth Circuit's decision in *Craft*, holding that a federal tax lien attached to an individual taxpayer's interest in entireties property. *United States v. Craft*, 535 U.S. 274, 122 S. Ct. 1414, 1420 (2002).

C. The Court of Appeals Decision in *Hatchett*

The Sixth Circuit, in *Hatchett*, held that, pursuant to *Craft*, the Government's lien attached to the taxpayer's interest in the entireties property, and that the Government could sell the entire entireties property, including the non-taxpayer's interest in the property, pursuant to the Administrative Levy Statue (App., *infra,* 15a). The *Hatchett* Court also reversed and remanded to allow the Government to amend its complaint to assert its claim of fraudulent conveyance and to present its nominee and lien tracing theories. (App., *infra,* 22a)

REASONS FOR GRANTING THE WRIT

I. The decision below creates a conflict between the circuits regarding the proper interpretation of 26 U.S.C. § 6331 and ignores this Court's opinion in *United States v. Rodgers*, regarding, inter alia, whether the Internal Revenue Service may sell the interest of a non-taxpayer in entireties property pursuant to an administrative levy which occurs without any court involvement or the due process safeguards found in a judicial foreclosure proceeding under 26 U.S.C. § 7403

Twenty years ago, this Court, in applying the plain language of the Administrative Levy Statute, 26 U.S.C. § 6331, held in *Rodgers* that "[u]nder 26 U.S.C. § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt property and rights to property . . . belonging to such person," i.e. the delinquent taxpayer [emphasis by the Court; internal quotation marks omitted]. *Rodgers*, 461 U.S. at 696. This Court noted, however, that under the Judicial Foreclosure Statute, 26 U.S.C. § 7403, the Government could sell not only the delinquent taxpayer's interest in property, but also the property itself even if third-parties also had an interest in such property. *Rodgers*, 461 U.S. at 694 ("Again, we must read the statute to contemplate, not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property (as long as the United States has any "claim or interest" in it), and the recognition of third-party interests through the mechanism of judicial valuation and distribution.").

This result was not only required by the plain language of the statutes, it was also consistent with Supreme Court case

law dating back to the 19th Century, upholding the distinction between what the Government could sell in an administrative levy versus what it could sell in a judicial foreclosure proceeding. *See e.g. Mansfield v. Excelsior Refining Co.*, 135 U.S. 326, 339-341, 10 S.Ct. 825, 830-831, 34 L.Ed. 162 (1890).

Since *Mansfield* though *Rodgers*, up to *Hatchett*, all federal courts have applied the plain language of the Administrative Levy Statute in holding that the Government could only sell the taxpayer's interest in property, as opposed to a non-taxpayer's interest in property (e.g. the property itself), absent a judicial foreclosure action being instituted under 26 U.S.C. § 7403.

A. The *Hatchett* Decision directly contradicts this Court's Decisions ranging from *Mansfield* through *Rodgers*

In this case, the Sixth Circuit in *Hatchett* held that entireties property itself (the taxpayer's interest and the non-taxpayer's interest), as opposed to just the taxpayer's interest in entireties property, could be sold by administrative levy. (App., *infra,* 11a). This holding flies in the face of Supreme Court jurisprudence dating back to the 19th Century.

Mansfield v. Excelsior Refining Co.

Since at least this Court's decision in *Mansfield v. Excelsior Refining Co.*, 135 U.S. 326, 339-341, 10 S.Ct. 825, 830-831, 34 L.Ed. 162 (1890), the Government has not been allowed to sell more than the taxpayer's interest in property pursuant to an administrative levy. It must proceed in a judicial foreclosure action if it wishes to sell the entire property in which the taxpayer has an interest, and in which

a non-taxpayer has an interest. In *Mansfield*, a tenant who operated a distillery on leased property fell delinquent in its taxes. The Government sought to sell by administrative levy the entire fee, not just the tenant's leasehold interest. The fee was owned by a third party. The *Mansfield* Court would not allow a sale by administrative levy, but suggested that on the facts of that case, the Government could seek a judicial sale of the entire property under the predecessor of § 7403.

In *Mansfield*, Justice Harlan stated,

> "The government neglected to pursue the only mode by which the fee could be sold; namely, a suit in equity, in which all persons interested in the property could have been made parties. When the [delinquent taxpayer] was in default in respect to taxes, it was for the proper officers of the government to elect whether they would seek satisfaction of its demands by means of a seizure and sale by the collector of the [delinquent taxpayer's] interest only, or by a suit to which all persons having claims upon the premises on which the government had a lien should be made parties. They chose to adopt the former method, under which only the interest of the delinquent ... could be seized and sold."

Mansfield, 135 U.S. at 341, 10 S.Ct., at 831.

In other words, the Government could have either levied administratively only on the leasehold or proceeded in equity (the forerunner of § 7403) to sell the entire freehold interest. Under the former approach, it could take only the interest that completely "belong[ed] to" the delinquent taxpayer, while under the latter, it could take property interests of which the delinquent owned only a part. *Accord, Blacklock v. United*

States, 208 U.S. 75, 28 S.Ct. 228, 52 L.Ed. 396 (1908).

United States v. Rodgers

In *United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983), the Court reaffirmed *Mansfield* and applied the plain language of §§ 6331 and 7403. After noting that § 7403 exhibits "grea[t] solicitude for third parties," 461 U.S. at 695, 103 S.Ct., at 2143, the Court discussed how §§ 6331 and 7403 differ:

> "Under ... § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt 'property and rights to property ... belonging to [the delinquent taxpayer]....' Section 6331, unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331. Indeed, third parties whose property or interests in property have been seized inadvertently are entitled to claim that the property has been 'wrongfully levied upon,' and may apply for its return either through administrative channels ... or through a civil action filed in a federal district court.... In the absence of such 'wrongful levy,' the entire proceeds of a sale conducted pursuant to administrative levy may be applied, without any prior distribution of the sort required by § 7403, to the expenses of the levy and sale, the specific tax liability on the seized property, and the general tax liability of the delinquent taxpayer."

Rodgers, 461 U.S. at 696, 103 S.Ct. at 2144.

The *Rodgers* Court later described the various advantages of each method of tax collection as follows:

> "Among the advantages of administrative levy is that it is quick and relatively inexpensive. Among the advantages of a § 7403 proceeding is that it gives the Federal Government the opportunity to seek the highest return possible on the forced sale of property interests liable for the payment of federal taxes. The provisions of § 7403 are broad and profound. Nevertheless, § 7403 is punctilious in protecting the vested rights of third parties caught in the Government's collection effort, and in ensuring that the Government not receive out of the proceeds of the sale any more than that to which it is properly entitled."

Rodgers, 461 U.S. at 699, 103 S.Ct. at 2145

As *Mansfield* and *Rodgers* make clear, this Court long has interpreted "property and rights to property belonging to the delinquent" to mean exactly that. Section 6331's reach extends only to property rights completely belonging to the delinquent taxpayer.

B. The *Hatchett* Decision Is Inconsistent with Circuit Court Case Law Which Applies the Plain Language of Section 6331 and limits an administrative levy to property or rights to property belonging to the taxpayer.

Hatchett

In *Hatchett,* the Sixth Circuit held:

> "Second, applying *Craft* to this case leads to the rule that, pursuant to § 6331, the Government may levy

> upon property held by a delinquent taxpayer as a tenancy by the entirety....Title 26 U.S.C. § 6335(c) (2002) states that "[i]f any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of tax and expenses, the whole of such property shall be sold." (emphasis added).The language of the statutes is clear. The power to levy includes the power to seize and sell these properties as prescribed by § 6335; property that cannot be divided in order to satisfy the whole of taxes and expenses shall be sold in its entirety. *Craft* allows the Government to levy upon the West Hickory, Franklin Boulevard, and South Saginaw properties held by the Hatchetts as tenants by the entirety"

The *Hatchett* Court believed that *Craft* held that the government's lien attached to the whole of the entireties property (the taxpayer's interest and the non-taxpayer's interest), and that § 6335 authorized a sale of the entireties property itself (the taxpayer's interest and the non-taxpayer's interest). The *Hatchett* Court was wrong in both respects.

In *Craft*, this Court held that the federal tax lien attached to the delinquent taxpayer's interest in the entireties property, it did not hold that it attached to the non-taxpayer's interest in the entireties property or the entireties property itself. *See Craft*, 535 U.S. at 276, 288 ("This case raises the question **whether a tenant by the entirety possesses "property" or "rights to property" to which a federal tax lien may attach. 26 U.S.C. § 6321**... We conclude that, despite the fiction, each tenant possesses individual rights in the estate sufficient to constitute "property" or "rights to property" for the purposes of the lien, and reverse the judgment of the Court of Appeals....When [the delinquent taxpayer] failed to pay, a federal tax lien attached to "all property and rights to

property, whether real or personal, belonging to" him...**We therefore conclude that respondent's husband's interest in the entireties property** constituted "property" or "rights to property" for the purposes of the federal tax lien statute..[emphasis added]")

Moreover, § 6335 cannot authorize a sale of the entireties property itself. That section states:

> "**[i]f any property liable to levy** is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of tax and expenses, the whole of such property shall be sold." (emphasis added).

By its express terms, however, § 6335 only applies to **"any property liable to levy"**. "Property liable to levy" refers back to § 6331, and is limited to the delinquent taxpayer's property or rights to property (Mr. Hatchett), and not a third person's property (Mrs. Hatchett). Section 6335 contemplates a situation where a taxpayer owns 100 acres of land; if only 10 acres need to be sold to satisfy the taxpayer's tax debt, the Government is only supposed to sell those 10 acres and not all 100 acres, if all 100 acres need to be sold as a package in order to satisfy the taxpayer's tax debt, § 6335 would authorize the sale of all 100 acres, it would not authorize the sale of a third-person's property or of property in which a third-person has an interest as in the instant case. *See* 26 C. F. R. §§ 301.6335-1("(C)(5)(iii) Condition of title and of property. Only the right, title, and interest of the delinquent taxpayer in and to the property seized shall be offered for sale..."); *Johnson v. Gartlan*, 470 F.2d 1104 (4th Cir. 1973)("In mid-1962 Mr. Johnson was the sole owner of 172.15 acres of unimproved land...On April 1, 1960, Johnson was assessed $586.15 by the United States government for unpaid income taxes...the IRS seized [and sold] the land to

satisfy its lien [pursuant to an administrative levy]...Miss Johnson raises an additional challenge to the validity of the sale, because although the property was divisible and her father owed only $586.15 in back taxes, the entire 172.15 acres were sold. This, the plaintiff argues, violated § 6335(c). [FN2] The entire tract was worth over $30,000, and only part of it need have been sold to satisfy the back tax claim,...Despite the government's failure to comply strictly with the statute, we hold that the tax sale must be regarded as valid because Mr. Johnson subsequently ratified it through his actions, in accepting and cashing the IRS check.").

Moreover, if § 6335 also authorized a levy upon, and sale of, more than a taxpayer's interest in property, without the safeguards of the Judicial Foreclosure Statute of § 7403, the careful distinction set forth by Congress in the Internal Revenue Code and this Court's jurisprudence dating back to at least 1890 would be turned upon its head.

O'Hagan

In *O'Hagan v. U.S.*, 86 F3d 776 (8th Cir. 1996), the IRS administratively levied on Mr. O'Hagan's interest in real estate which he owned jointly with his wife. The property was the O'Hagan's homestead and was held by them jointly with a right of survivorship. The government imposed an assessment against Mr. O'Hagan (and not Mrs. O'Hagan) for unpaid federal income tax liabilities, and then seized the homestead property after having levied on Mr. O'Hagan's interest in the property pursuant to 26 U.S.C. § 6331. The government then advertised for sale Mr. O'Hagan's interest in the real estate. Mrs. O'Hagan filed an action pursuant to 26 U.S.C. §§ 7426 to enjoin the IRS from selling her husband's interest in the real estate. The district court, on the motion of Mrs. O'Hagan, enjoined the forced sale of Mr. O'Hagan's

interest. In affirming the District Court, in part, the Eighth Circuit held:

> "It is well established that in a levy proceeding, the IRS " 'steps into the taxpayer's shoes.' " *United States v. Rodgers*, 461 U.S. 677...The administrative levy statute only authorizes the IRS to "levy upon all property and rights to property" belonging to the delinquent taxpayer, except certain exempt property which is not at issue in the present case. 26 U.S.C. § 6331. In levying upon Mr. O'Hagan's interest in the homestead property, however, the government could not acquire more property rights than those already held by Mr. O'Hagan.... We emphasize that even the judicial lien foreclosure proceeding set out in 26 U.S.C. § 7403--which might enable the government to sell the entire homestead and compensate the innocent spouse with monetary damages--allows the supervising court equitable discretion as to whether it would authorize the transaction. *See Rodgers*, 461 U.S. at 706, 103 S.Ct. at 2149...Our conclusion is consistent with the Supreme Court's decision in *Rodgers*, in which the Court held that homestead property could be sold--pursuant to the judicial lien foreclosure procedure under section 7403 of the IRC--to satisfy tax obligations owed by only one spouse. The Court also acknowledged, however, that its decision did not affect the traditional rule that the homestead property rights of an unindebted spouse could not be sold pursuant to an administrative levy, such as the IRS is attempting here, to satisfy the other spouse's tax liability. *Rodgers*, 461 U.S. at 702-03 n. 31..."

See also National Bank & Trust Co. of South Bend v. United States, 589 F.2d 1298, 1303 (7th Cir. 1978)("Our construction

of § 6339(a)(5) is consistent with § 6331(a)...All of the above refer to the subject of the levy and sale as the right, title, and interest of the taxpayer...This construction of § 6339(a)(5) is further supported by contrasting the levy procedures of § 6331 Et seq. with the judicial proceeding authorized under 26 U.S.C. § 7403. Under § 7403, the district court is expressly empowered to finally determine all claims to the property involved, i. e., the interests involved extend beyond those of the taxpayer. In these circumstances Congress has recognized a need for protection of third-party interests and has required that all persons with liens on or claims of interest in the property be made parties to the action. 26 U.S.C. § 7403(b). The absence of a similar requirement under the levy procedures implies that no disturbance of third-party interests was intended.").

CONCLUSION

The language of the Administrative Levy Statue, 26 U.S.C. § 6331 is clear on its face, has been interpreted by this Court and by the Circuit Courts consistent with its plain language, and allows the Government to summarily seize and sell only the delinquent taxpayer's property. If the Government wants to sell property in which the taxpayer and a third party have an interest, they must go to District Court and commence a judicial foreclosure action with its attendant due process protections, pursuant to 26 U.S.C. § 7403.

In the instant case, on one month's notice, the Government seized and filed notices that it intended to sell Mr. and Mrs. Hatchett's real estate held by the entireties (including the marital home), and real estate held by Mrs. Hatchett, individually, though Mrs. Hatchett did not owe any delinquent tax liability. While the Government may have had

a right to sell Mr. Hatchett's interests in the entireties property, it does not have a right to sell the entireties property itself (made up of Mr. Hatchett's interests and Mrs. Hatchett's interests), absent a judicial foreclosure proceeding under 26 U.S.C. § 7403, which it has never instituted. **As indicated by the Government's own Motion to Amend Opinion (App., *infra,* 51a), the Government does not even agree that it has the power to sell more than Mr. Hatchett's interests in an administrative levy, and has requested that the Sixth Circuit amend its decision accordingly.**

If left to stand, taxpayers in the Sixth Circuit will be treated differently than all other taxpayers in the nation, even if they do not owe any tax liability, the Government will be able to sell their interest in property along with the delinquent taxpayer, summarily and without the due process limitations of a judicial foreclosure proceeding. For instance, this Court in *Rodgers* required that the District Court utilize a balancing test to determine whether the property in which the taxpayer and the non-taxpayer have an interest would be sold, by balancing the interests of the Government and the non-taxpayer. *Rodgers*, 461 U.S. at 710-711; *Hatchett*, (App. at p. 15a) ("In explaining that a court in a § 7403 proceeding is charged with exercising its discretion regarding the sale of levied property, the Court in *Rodgers* held that several factors should be considered by the district court in deciding whether to authorize the forced sale....The action in this case is an administrative levy pursuant to § 6331 and therefore Rodgers has absolutely no application here. Accordingly, under *Craft* the Government is able to sell the Hatchetts' entireties properties and collect the mortgage payments").

The *Hatchett* Court expressly held that this due process protection only applies to judicial foreclosures and not administrative levies, and that the entireties property owned

by Mr. and Mrs. Hatchett, including their marital residence, could be sold by administrative levy (App. at p. 15a). This interpretation of the Administrative Levy Statute ignored over a century of this Court's holdings, the plain language of the Statute, and the Circuit Court case law, creating disparate treatment between taxpayers, depending on whether they live within the Sixth Circuit. The question presented by this petition for certiorari has enormous practical significance upon a large number of tax cases, and the instant petition should be granted.

Respectfully submitted,

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Dated: December 29, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Number: 03a0176p.06
[Filed June 4, 2003]

Elbert L. Hatchett and Laurestine Hatchett, Plaintiffs-Appellees,	)
v.	)
United States of America, Defendant-Appellant.	)

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Defendant-Appellant United States appeals the judgment entered by the United States District Court for the Eastern District of Michigan in favor of Plaintiffs-Appellees Elbert L. Hatchett and his wife Laurestine Hatchett. In an attempt to collect a portion of the more than $8,000,000 owed by Elbert in unpaid taxes, the United States commenced administrative levy proceedings by filing levies and notices of sale for four parcels of real property, and a levy for the seizure of mortgage payments due to the Hatchetts on a fifth parcel. In order to stop the proceedings, the Hatchetts brought a wrongful levy action against the United States claiming that the levies were wrongful because they were against properties held by the Hatchetts as tenants by the entirety. The district court, relying on a decision of this Court, *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998) agreed with the Hatchetts and found that

the levies were wrongful. The United States primarily argues that this Court's decision in *Craft* was wrong as matter of law and that the levies may attach to property held as a tenancy by the entirety. The United States also argues that the levies were not wrongful under three other legal theories: (1) a fraudulent conveyance theory, in which the Government claims that Elbert used his individual funds to purchase and enhance property that was titled as a tenancy by the entirety; (2) a nominee theory, in which the Government claims that other individuals are holding the entireties properties as Elbert's nominees; and (3) a lien tracing theory, in which the Government claims that since it has a lien on Elbert's money, it is entitled to place a lien on the properties improved or purchased with that money.

After notice of appeal had been filed and the case had been set for oral argument, the Supreme Court granted certiorari on *Craft* and agreed with the Government's position that federal tax liens may attach to property held by a delinquent taxpayer as a tenancy by the entirety. Because the Supreme Court has answered the question of whether the Government may levy against real property held as a tenancy by the entirety, we **REVERSE** the decision of the district court and **REMAND** for entry of judgment consistent with current Supreme Court precedent. Furthermore, we **REVERSE** and **REMAND** the district court's refusal to allow the Government to amend its complaint and to assert its claim of fraudulent conveyance; we **REVERSE** and **REMAND** the district court's grant of summary judgment for the Hatchetts on the Government's nominee and lien tracing theories.

I. BACKGROUND

This case began more than twenty-five years ago when Elbert, a prominent Detroit trial attorney, decided to forego

payment of federal and state income taxes. In 1989, Elbert was convicted by a jury of four misdemeanor counts of willful failure to pay federal income taxes. *United States v. Hatchett*, 918 F.2d 631, 633 (6th Cir. 1990). He was sentenced to three consecutive one-year sentences, placed on five years' probation, fined $100,000 and ordered to pay "all back taxes" as a condition of probation. *Id.* We affirmed that sentence, and Elbert spent three years in prison. *Id.* at 644.

The Internal Revenue Service ("IRS") made an assessment on October 24, 1994 that Hatchett owed more than $6.6 million in federal income taxes and penalties for the tax years 1975 to 1991. As of March 25, 1998, Elbert's tax liabilities totaled more than $8.6 million.

In an attempt to collect the delinquent taxes, the IRS levied against four parcels of real estate owned by the Hatchetts and one series of mortgage payments owed to the Hatchetts on a fifth parcel pursuant to 26 U.S.C. § 6331 (2002). The Hatchetts received a Tax Levy, dated October 24, 1994, and four Notices of Seizure, dated October 25, 1994. Two of the properties are owned jointly by the Hatchetts as tenants by the entirety: (1) their primary residence ("West Hickory"); and (2) a property operated as a car wash ("South Saginaw"). Two properties are held individually by Laurestine: (1) a property occupied by Elbert's mother ("Franklin Boulevard"); and (2) a property in Bloomfield Township. The IRS scheduled a public auction to sell the real properties on November 30, 1994.

On January 24, 1995, the IRS levied mortgage payments due to the Hatchetts from a property previously owned by the Hatchetts and used for horsebreeding and entertaining clients ("Cyclone"). The Cyclone property was sold to a husband and wife, Ernest and Hermetha Blythe Ann Jarrett, in 1991. The

Hatchetts took back a mortgage of $80,000 on the Cyclone property, to be paid in semiannual installments of $6,000 on interest and principal, beginning February 19, 1992 and continuing until August 19, 2001.

At the time the IRS issued the four levies in 1994, the Hatchetts held title to the West Hickory and South Saginaw properties as tenants by the entirety. Laurestine has held individual title to the Franklin Boulevard property since 1994, but it was held by the Hatchetts as tenants by the entirety when the federal tax lien first attached in 1978. The Hatchetts held the Cyclone property as tenants by the entirety until it was conveyed by warranty deed to the Jarretts on August 19, 1991.

On November 21, 1994, the Hatchetts commenced a wrongful levy action in the district court pursuant to 26 U.S.C. §§ 7426 (2002) to enjoin the tax sale of the four parcels of real estate and the seizure of the mortgage payments due. The district court entered two stipulated orders, on December 7, 1994 and June 23, 1995, enjoining the IRS from conducting the public auction or levying on the pending mortgage payments until the propriety of the levies was determined. On June 25, 1996, Magistrate Judge Donald A. Scheer issued two orders, consistent with his bench rulings: (1) an order granting the Hatchetts' Petition to Quash the Government's request for a number of documents from 1972 to the present; and (2) an order granting the Government's motion to amend its answer to the Hatchetts' complaint and assert fraudulent conveyance as an affirmative defense. The district court issued a Memorandum Opinion and Order on February 28, 1997, reversing the two orders of the magistrate judge.

On March 31, 2000, the district court entered a judgment deciding the cross-motions for summary judgment filed by the Hatchetts and the Government. The court granted the Hatchetts' summary judgment motion and denied the Government's motion with respect to the West Hickory, Franklin Boulevard, South Saginaw, and Cyclone properties; the court granted the Government's summary judgment motion and denied the Hatchetts' motion with respect to the Bloomfield Township property. In its decision to grant the Hatchetts summary judgment, the district court relied on our decision in *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998) ("*Craft I*") and held that the Government was not entitled to levy property held in tenancies by the entirety. This timely appeal followed on June 1, 2000.

II. DISCUSSION

A. Standard of Review

This Court reviews the district court's summary judgment decision *de novo*. *See Watkins v. Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving

party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Applicability of United States v. Craft

On March 16, 2001, this Court issued an opinion on the appeal from its remand of *Craft I* and again held that the Government was unable to levy property held as a tenancy by the entirety. *Craft v. United States*, 233 F.3d 358 (2001) ("*Craft II*"). However, in 2002 the Supreme Court granted certiorari on *Craft II* and reversed the decision of this Court. The Supreme Court held that property titled as a tenancy by the entirety could be levied by the Government. *United States v. Craft*, 122 S. Ct. 1414, 1420 (2002) ("*Craft*").

Sandra Craft was the wife of a delinquent taxpayer, Don, and she and her husband owned property as tenants by the entirety under Michigan law. *Craft I*, 140 F.3d at 639. In 1988, the IRS filed a notice of federal tax lien under 26 U.S.C. §§ 6321 (2002) on all of Don's property, including the entireties property, due to a liability of $482,446.73 in unpaid taxes. *Id.* After the lien was filed, the Crafts transferred the entireties property to Sandra by way of a quitclaim deed, in exchange for $1.00. *Id.* When Sandra attempted to sell the property in 1992, the federal lien was discovered. *Id.* at 640. The IRS agreed to release the lien on the property and allow the sale to go forward conditioned on Sandra's placing half the proceeds of the sale into an escrow account until a court decided the nature and extent of the Government's interest in the property. *Id.* In 1993, Sandra brought an action in the district court to quiet title to the proceeds being held in the escrow account. *Id.*

In the district court, the Government maintained that the lien attached to the property despite the fact that the Crafts held it as tenants by the entirety. *Id.* The district court rejected that argument and instead held that the tenancy by the entirety was terminated when the Crafts executed the quitclaim deed. *Id.* The court concluded that each spouse momentarily held a one-half interest in the property and that the tax lien attached to Don's interest for that brief moment. *Id.*

On appeal, we rejected the notion that Don held a transitory one-half interest in the property when the property was conveyed to Sandra. Relying principally on our decisions in *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971) and *United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136 (6th Cir. 1992), we held that under Michigan law, a spouse does not possess a separate interest in the entireties property and therefore, the tax lien could not attach to the entireties property. *Id.* at 643-44. On remand, the district court conducted a bench trial and held that Don had committed fraud by making several mortgage payments on the property while claiming to be insolvent. *Craft II*, 233 F.3d at 363. Both parties appealed the decision, with the Government again claiming that its lien attached to the taxpayer's interest in the entireties property, and the case was heard by this Court for a second time. Applying the doctrines of the law of the case and the law of the circuit, we held that the panel's decision in *Craft I* must stand and that the federal tax lien did not attach to the entireties property. *Id.* at 369.

The Supreme Court granted certiorari to "consider the Government's claim that respondent's husband had a separate interest in the entireties property to which the federal tax lien attached." *Craft*, 122 S. Ct. at 1420. In a six to three decision, the Supreme Court reversed and remanded the decision of this Court. The Supreme Court began its analysis

by using the common idiom of a "bundle of sticks" to describe property interests. *Id.* It described the relationship between state and federal law in the following terms: "State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law." *Id.* The Court held that "despite the [state law fiction that a tenant by the entirety has no separate interest in entireties property] each tenant possesses individual rights in the estate sufficient to constitute 'property' or 'rights to property' for the purposes of the lien . . . ." *Id.* at 1419. The Court examined the individual rights created under Michigan law with respect to entireties property and concluded that those rights included:

> [T]he right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.

Id. at 1422. The Court also noted that the most essential property rights granted by Michigan -- the rights to use the property, to receive income produced by it, and to exclude others from it -- alone constituted rights sufficient to subject a delinquent taxpayer's interest in an entireties property to a federal tax lien. *Id.* at 1423.

Emphasizing that the "interpretation of 26 U.S.C. §§ 6321 is a federal question," the Supreme Court reasoned that "if neither [the husband nor the wife] had a property interest in

the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system." *Id.* at 1424, 1425.

With this decision, the Supreme Court unequivocally stated that the language in §§ 6321 allowing the Government to place a lien upon "all property and rights to property, whether real or personal," included the right to place federal tax liens on properties held as tenancies by the entirety. Furthermore, the inclusion of entireties property in the definition of "all property and rights to property" in §§ 6321 is directly applicable to §§ 6331(a), which allows for the Government to collect unpaid taxes by administrative levy of "all property and rights to property . . . belonging to such person or on which there is a lien . . . ." The scope of the federal tax lien and the scope of the levy are identical and interests subject to a federal lien are also subject to an administrative levy. Accordingly, the Government in this case is able to levy against and seize the West Hickory, Franklin Road, and South Saginaw properties, as well as the Cyclone mortgage payments, all held by the Hatchetts as tenants by the entirety.

C. Retroactive Application of *United States v. Craft*

The Hatchetts argue that even if *Craft* is applicable, it should not be applied retroactively. As support for this argument, the Hatchetts offer *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), which announced that a three-prong balancing test should be used in deciding whether a new principle of law should be applied retroactively. The Hatchetts argue that under the *Chevron Oil* balancing test, retroactive application of *Craft* would have "far-reaching untoward effects upon

many, including tax professionals and the title industry." Additionally, citing to one of the dissents in *Craft*, the Hatchetts argue that there has been a general reliance in this country, including within the IRS, on the fact that the Government is unable to levy against property held as a tenancy by the entirety. These arguments are based on an incorrect understanding of current Supreme Court precedent.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), the Supreme Court held that its decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), applied retroactively to retired federal employees seeking refunds for taxes imposed on their federal retirement benefits by the state of Virginia. 509 U.S. at 89-90. The Court abandoned the balancing test articulated in *Chevron Oil*, developing a new standard for determining retroactivity in civil cases:

> [O]ur decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one.

Id. at 95 n.9 (*quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (Souter, J.)); *see also In re Federated Dep't Stores, Inc.*, 44 F.3d 1310, 1317 (6th Cir. 1995) (recognizing that *Chevron Oil* has been overruled by *Harper*). The Court in *Harper* held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full

> retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97; *see also United States v. Real Prop. Located at 1184 Drycreek Rd., Granville, Oh. 43023*, 174 F.3d 720, 727 (6th Cir. 1999) (noting that *Harper* mandates the application of a new Supreme Court case decided while the present case was on direct appeal). Moreover, the Court in *Harper* invoked the Supremacy Clause and rejected Virginia's argument that states have the ability to limit the retroactive operation of federal law. 509 U.S. at 100 ("Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law[,] . . . cannot extend to their interpretations of federal law.") (citations omitted); see also *Drye v. United States*, 528 U.S. 49, 57 (1999) ("[F]ederal, not state [law] control[s] the ultimate issue whether a taxpayer has a beneficial interest in any property subject to levy for unpaid federal taxes."); *United States v. Rodgers*, 461 U.S. 677, 678-79 (1983) (holding that the Supremacy Clause allows the Government to "sweep aside state-created exemptions" to the collection of federal taxes and apply federal law).

The Supreme Court detailed the process for consideration of retroactivity in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), stating that:

> [W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events.

514 U.S. at 752.

Applying *Reynoldsville Casket*, we find that first, *Craft* announces a new rule of federal law. Several federal and state courts, including our Court, as well as the IRS, had assumed that entireties property was excluded from the definition of "all property and rights to property" as defined by the tax code. *See*, *e.g.*, *Craft*, 122 S. Ct. at 1431-32 (Thomas, J., dissenting) (listing cases). Therefore, the result in *Craft* is that a new rule of federal law was announced. Also, the Court applied the rule in *Craft* to the parties before it. In holding that the Government was authorized to attach liens to entireties property, the Court remanded the decision in *Craft* to this Court to determine the exact valuation of the taxpayer's interest in the entireties property and the amount owing to the Government. *Id.* at 1426. Second, the present case was pending on direct review when the Supreme Court's decision in *Craft* was rendered. Indeed, the Government's primary argument to this Court on appeal depended on the outcome of *Craft II*, which was pending review in our Court at the time the Government's appeal was filed, and any subsequent review by the Supreme Court. Accordingly, *Craft* applies retroactively to this case.

D. Right of the Government to Sell the Levied Property

The Hatchetts argue in the alternative that, even if the Government may levy the entireties property, the result in *Craft* does not compel the Government to sell the property. They briefly analogize their situation to that of a partnership, stating that "while the Government's lien can attach to an individual partner's interest in a partnership, it does not attach to the partnership assets, and the Government cannot sell those partnership assets." Citing to *Drye*, the Hatchetts also assert that the Government may levy merely on Elbert's "right

of use and right of exclusion, subject to his wife's right of use and exclusion." These arguments are wholly without merit.

First, the majority in *Craft* specifically rejected the argument advanced in the dissents by Justices Scalia and Thomas that "the conclusion that the husband possessed an interest in the entireties property to which the federal tax lien could attach is in conflict with the rules of tax liens relating to partnership property." *Craft*, 122 S. Ct. at 1424. The Court stated that "[t]here is, however, a difference between the treatment of entireties property and partnership assets." *Id.* Accordingly, the Hatchetts' attempt to equate entireties property to partnership assets is an argument that already was considered and rejected by the Supreme Court.

Second, applying *Craft* to this case leads to the rule that, pursuant to §§ 6331, the Government may levy upon property held by a delinquent taxpayer as a tenancy by the entirety. Section 6331(b) specifically states that:

> (b) Seizure and sale of property.- The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. *In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).*

(emphasis added). Furthermore, §§ 6331(l) states that "[f]or proceedings applicable to sale of seized property, see section 6335." Title 26 U.S.C. §§ 6335(c) (2002) states that "[i]f any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount

of tax and expenses, the whole of such property *shall* be sold." (emphasis added).

The language of the statutes is clear. The power to levy includes the power to seize and sell these properties as prescribed by §§ 6335; property that cannot be divided in order to satisfy the whole of taxes and expenses shall be sold in its entirety. *Craft* allows the Government to levy upon the West Hickory, Franklin Boulevard, and South Saginaw properties held by the Hatchetts as tenants by the entirety. In 1998, the taxable value of these properties was estimated as follows: (1) West Hickory at $544,400, (2) Franklin Boulevard at $19,720; and (3) South Saginaw at $60,480. Elbert's outstanding tax indebtedness in excess of $8,000,000 far exceeds the value of his interests in the entireties properties. Accordingly, the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to §§ 6335(c).

The Hatchetts, relying on the Supreme Court's decision in *Rodgers*, also argue that even if the Government is entitled to sell the entireties property, we should remand the case to the district court for consideration by that court of whether the sale should be allowed to go forward. The Hatchetts' reliance on *Rodgers* is misplaced. The Court in *Rodgers* decided that a Texas homestead law did not prevent the Government from forcing the sale of a family house to satisfy tax indebtedness. 461 U.S. at 680. The Government chose to pursue the taxpayer in *Rodgers* under 26 U.S.C. §§ 7403 (2002), which authorizes the Government to pursue a taxpayer by filing a civil action in a district court for the payment of delinquent taxes. In a proceeding under §§ 7403, the district court adjudicates all the matters involved, makes a final determination of the claims, and decrees a sale of the property if the Government's claim is established. §§ 7403 (c). In

explaining that a court in a §§ 7403 proceeding is charged with exercising its discretion regarding the sale of levied property, the Court in *Rodgers* held that several factors should be considered by the district court in deciding whether to authorize the forced sale. 461 U.S. at 710-11.

As the Court explained in *Rodgers*, a §§ 7403 proceeding is wholly different from an "administrative levy under 26 U.S.C. §§ 6331." 461 U.S. at 682. An action under §§ 6331, the Court noted, is "unlike the procedure described in §§ 7403, [and] does not require any judicial intervention, and it is up to the taxpayer . . . to go to court if he claims that the assessed amount is not legally owing." *Id.* at 682-83. The action in this case is an administrative levy pursuant to §§ 6331 and therefore *Rodgers* has absolutely no application here. Accordingly, under *Craft* the Government is able to sell the Hatchetts' entireties properties and collect the mortgage payments.

E. The Government's Alternative Theories

The Government argues that the district court erred in refusing to allow it to present three alternative theories of defense to the Hatchetts' wrongful levy action. The Government argues that if there is sufficient evidence to support these three theories, it would be allowed to retain a higher percentage of the proceeds from the sale of the entireties property.

1. Fraudulent conveyance theory

In 1996, pursuant to Federal Rule of Civil Procedure 15(a), the Government filed a motion to amend its answer to the Hatchetts' wrongful levy complaint in order to assert the affirmative defense of fraudulent conveyance. Under this

theory, the Government argued that Elbert, while insolvent, used his individual funds to purchase and enhance property that he placed in entireties ownership in order to prevent his creditors from attaching it. A magistrate judge issued an order granting the Government's motion to amend its answer. However, in a February 28, 1997 Memorandum and Opinion, the district court reversed the order of the magistrate judge and refused to allow the Government to present its theory of fraudulent conveyance. The district court also ruled on the Hatchetts' Motion to Strike Fraudulent Conveyance Defense and for Summary Judgment and granted the Motion to Strike and the Motion for Summary Judgment as to the fraudulent conveyance issue. The court discussed three reasons for its holding: (1) the Government lacked standing to bring the theory; (2) introduction of the theory was barred by res judicata; and (3) introduction of the theory was barred by laches.

We review a denial of a motion to amend the pleadings for abuse of discretion. *Fisher v. Roberts*, 125 F.3d 974, 977-78 (6th Cir. 1997); *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1104 (6th Cir. 1995). However, if the court denies the motion on grounds that the motion would be futile, the denial is reviewed *de novo*. *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000); *LRL Props.*, 55 F.3d at 1104; *see also Dubuc v. Green Oak Township*, 312 F.3d 736, 743-44 (6th Cir. 2002). Because the district court's disposition of this issue is equivalent to a denial based on futility, we review the decision *de novo*. We disagree with all three of the reasons set forth by the district court and remand with instructions to grant the Government's motion to amend its answer.

a. Standing

The district court, relying in part on *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708-09 (7th Cir. 1994), held that the Government lacked standing to assert the fraudulent conveyance defense. The court held that the bankruptcy trustee, appointed in September, 1990, had the exclusive authority to pursue a claim of fraudulent conveyance under 11 U.S.C. §§ 548 (2002) of the Bankruptcy Code. We disagree.

In September, 1992, the bankruptcy trustee filed a complaint against Elbert based upon a theory of fraudulent conveyance. However, on February 25, 1993, the trustee filed a motion to abandon its fraudulent conveyance action after determining that the liens filed in favor of the IRS and the State of Michigan exceeded the Hatchett's equity in the properties at issue. The trustee determined that because no funds would be available from the liquidation of properties for unsecured creditors, he should abandon the claim. In March, 1993 the trustee's fraudulent conveyance action was officially abandoned and the matter was settled in the Bankruptcy Court in April, 1993.

Section 548 of the Bankruptcy Code provides

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily–
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after

> the date that such transfer was made or such obligation was incurred, indebted . . .

11 U.S.C. §§ 548 (a) (1993). Though the trustee has the exclusive right to bring an action for fraudulent conveyance during the pendency of the bankruptcy proceedings, the Bankruptcy Code does not extinguish the right of the Government to bring a state law action for fraudulent conveyance after the debtor receives a discharge in bankruptcy. In *Havlik*, the Seventh Circuit held that the right to recoup a fraudulent conveyance is exclusive to the trustee, and specifically noted that this right only attached "once a bankruptcy is under way." 20 F.3d at 709. The court said nothing about the right of individual creditors to pursue state law claims for fraudulent conveyance once the bankruptcy was discharged. In *Klingman v. Levinson*, 114 F.3d 620, 629 (7th Cir. 1997), the court held that bankruptcy proceedings only have the effect of imposing a temporary stay of a fraudulent conveyance action by the Government. The court in *Klingman* held that once the bankruptcy court issued findings on the matter, the Government could proceed on a state law fraudulent conveyance action in the district court. *See also Nat'l Am. Ins. Co. v. Ruppert Landscaping Co., Inc.*, 187 F.3d 439, 441 (4th Cir. 1999) (noting that an individual creditor can pursue fraudulent conveyance claims only after such a claim has been abandoned by the trustee); *Kathy B. Enter., Inc. v. United States*, 779 F.2d 1413, 1415 (9th Cir. 1986) (holding that once the bankruptcy proceedings are over, the IRS is able to pursue a collection action because such an action would not interfere with rights of other creditors); *Fed. Deposit Ins. Corp. v. Davis*, 733 F.2d 1083, 1085 (4th Cir. 1984) ("Once a bankruptcy case has been closed, creditors having unavoided liens on fraudulently conveyed property can pursue their state law remedies independently of the trustee in bankruptcy."). Accordingly,

because the bankruptcy proceedings are over, the Government has standing to assert its fraudulent conveyance theory.

b. Res judicata

The district court also held that the Government's fraudulent conveyance claim was barred by the doctrine of res judicata. With a cursory explanation, the district court held that the Bankruptcy Court's approval of a settlement regarding the fraudulent conveyance issue bars any further litigation on the matter. We disagree. A claim in a second action is barred under the doctrine res judicata if: (1) the first action resulted in a final judgment on the merits; (2) both actions are between the same parties; (3) the issue in the second action should have been litigated in the first action; and (4) the claim is identical in both actions. *Wilkins v. Jakeway*, 183 F.3d 528, 532 (6th Cir. 1999). The action at issue here does not even meet the first requirement of the doctrine of res judicata. The bankruptcy trustee abandoned any action to recover the properties based on a theory of fraudulent conveyance. Accordingly, there was no final judgment on the merits regarding the issue of fraudulent conveyance and the doctrine of res judicata does not apply.

c. Laches

Finally, the district court held that the Government's fraudulent conveyance defense was barred by laches. In its summary disposition of the issue, the district court relied on *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1 (Fed. Cir. 1985) and 11 U.S.C. §§ 546 (2002). This reliance was misplaced. It is well established that the Government generally is exempt from the consequences of its laches. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes

of limitation or subject to the defense of laches in enforcing its rights."); *Guar. Trust Co. v. United States*, 304 U.S. 126, 132 (1938) (noting the continuing vitality of the rule that the sovereign is exempt from its own laches); *United States v. Peoples Household Furnishing, Inc.*, 75 F.3d 252, 254 (6th Cir. 1996) ("The ancient rule . . . 'that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations' - has enjoyed continuing vitality for centuries.") (citation omitted); *United v. Weintraub*, 613 F.2d 612, 618 (6th Cir. 1979) ("The principle [that the Government is exempt for the consequences of its own laches] is well established in this country."). However, the Government may be subject to laches in certain types of action. *See S.E.R.*, 759 F.2d at 6-7. The court in *S.E.R.* merely held that the doctrine of laches may be applicable against the Government in the limited exception of contract cases, saying nothing regarding any other type of action involving the Government. *Id.* at 8. Accordingly, there is no precedent holding that the Government is subject to its own laches in tax collection actions.

Under §§ 546, a fraudulent conveyance action must be commenced within two years of the appointment of the Chapter 7 trustee. Because the bankruptcy trustee was appointed on September 10, 1990, the court reasoned that the Government's fraudulent conveyance action is untimely. However, the statute of limitations in §§ 546 applies only to actions by trustees. *See Weintraub*, 613 F.2d at 618 ("While the general rule . . . is that the sovereign is exempt from the operation of statutes of limitations, an exception to that general rule exists when the sovereign (through the legislature) expressly imposes a limitation period upon itself."). As we have discussed, this state law action by the Government for fraudulent conveyance commenced after the discharge of the bankruptcy and has nothing to do with the

rights of the trustee. Accordingly, the statute of limitation set forth in §§ 546 is irrelevant to the Government's action and the general rule that the Government is exempt from the doctrine of laches applies in the instant case.

Furthermore, we reverse the district court's decision to grant the Hatchett's Motion to Strike Fraudulent Conveyance Defense. We review the grant of a motion to strike a pleading for abuse of discretion. *See, e.g., Fisher*, 125 F.3d at 977-78 (6th Cir. 1997); *LRL Prop.*, 55 F.3d at 1104. For the reasons stated above, we find that the district court abused its discretion in granting the Hatchett's motion to strike.

2. Nominee and lien tracing theories

The Government also wanted to argue at the trial level that its levies were proper under both a nominee theory and a lien tracing theory, and sought to introduce evidence in support of these theories. Under the nominee theory, the Government argues that other individuals are holding three properties and rights to the mortgage payments as nominees of Elbert. The Government argues that Elbert shielded the properties and payments from his tax liabilities with these title arrangements. Under the lien tracing theory, the Government argues that since it had a lien on Elbert's money, it is entitled to place a lien on the properties improved or purchased with that money.

In a March 31, 2000 Order Denying Defendants' Motion for Recusal and Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *Hatchetts v. Internal Revenue Serv.*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), the district court ruled that the Government's nominee and lien tracing theories were unpersuasive. The court based its decision on the fact that, under *Craft I*, we held that taxpayers

did not hold any separate interest in property held as a tenancy by the entirety to which a lien can attach.

This Court reviews the district court's summary judgment decision *de novo*. *See Watkins*, 273 F.3d at 685. In light of the Supreme Court decision in *Craft*, both theories are relevant in determining the Government's interest in the entireties properties and mortgage payments at issue. Accordingly, the Government is entitled to present its nominee and lien tracing theories on remand in order to determine the exact value of the Government's interests.

III. CONCLUSION

For the reasons stated, we **REVERSE** the decision of the district court granting Appellees' motion for summary judgment, and **REMAND** to the district court for further proceedings in accordance with this opinion. Furthermore, we **REVERSE** and **REMAND** the district court's denial of the Government's Motion to Amend its answer to include a fraudulent conveyance defense, and we **REVERSE** and **REMAND** the district court's grant of summary judgment for the Hatchetts on the Government's nominee and lien tracing theories.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 00-1645
[Filed September 30, 2003]

Elbert L. Hatchett and Laurestine Hatchett, Plaintiffs-Appellees,	)
v.	)
United States of America, Defendant-Appellant.	)

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

UNITEDSTATES DISTRICT COURT,
E.D. MICHIGAN, SOUTHERN DIVISION.

Case No.: 94-CV-74708-DT
[March 31, 2000]

Elbert L. HATCHETT, and Laurestine Hatchett, Plaintiffs,	)
v.	)
INTERNAL REVENUE SERVICE, and United States of America, Defendants.	)

ORDER DENYING DEFENDANTS' MOTION FOR RECUSAL AND GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

HOOD, District Judge.

This matter is before the Court on the Government's motion to have this Court recuse itself. The Government contends that this Court obtained extra-judicial knowledge about the instant wrongful levy action while sitting on a three judge panel which presided over Plaintiff Elbert Hatchett's attorney reinstatement proceeding. The matter is also before the Court on cross motions for summary judgment filed by the parties. The Government argues in opposition to Plaintiffs that taxes levied against four properties and a mortgage owned by Plaintiffs were not wrongful under four theories: fraudulent conveyance, lien tracing, nominee/alter ego, and instantaneous lien attachment. For the reasons set forth

herein, the Court denies the Government's motion for recusal, denies in part and grants in part the Government's and Plaintiffs' cross motions for summary judgment.

I. FACTS

A. Wrongful Levy Action

Elbert and Laurestine Hatchett, who are husband and wife, filed this wrongful levy action against the IRS and the United States (referred to collectively as the "Government") on November 21, 1994, requesting that this Court enjoin the tax sale of four real properties and the seizing of mortgage payments due to the Hatchetts on another real property because the properties are either owned by Elbert and Laurestine Hatchett as tenants by the entireties under Michigan law or are owned individually by Laurestine Hatchett.

Elbert and Laurestine Hatchett received a Tax Levy and four Notices of Seizure dated October 24 and 25, 1994, which indicated that the four parcels of real property had been seized for nonpayment of past due taxes owed by Elbert Hatchett. Several days later, Plaintiffs received Notices of Public Auction Sale which indicated that the real properties would be sold at a public auction on November 30, 1994 ("Tax Sale"). The four properties are as follows:

1) 285 West Hickory Grove, Bloomfield Hills, Michigan;
2) 79 Bloomfield Blvd., Bloomfield Township, Michigan;
3) 82 Franklin Blvd., Pontiac, Michigan;
4) 352 South Saginaw, Pontiac, Michigan.

Plaintiffs claim that the tax levies on 285 West Hickory Grove and 352 South Saginaw are wrongful because they were owned by Elbert and Laurestine Hatchett as tenants by entirety at the time of the levy and as of the date of the Complaint. The Government claims that the property at 285 West Hickory Grove was purchased as tenants by the entirety in April 1974, but was quit claimed to Laurestine Hatchett and the Hatchetts' daughter, Ayanna Hatchett, in August 1991. The Government claims the property at 352 South Saginaw was quit claimed into a tenancy by entirety in March 1984, and quit claimed to Elbert's wife and daughter in August 1994.

Plaintiffs claim the tax levies on 82 Franklin Blvd. and 79 Bloomfield Blvd. are wrongful because they were owned individually by Laurestine Hatchett. The Government claims Elbert Hatchett bought the property at 79 Bloomfield in his own name in October 1973 and conveyed it into tenancy by entirety in May 1984. The Government claims the Hatchetts quit claimed the property at 82 Franklin out of the tenancy by entirety and conveyed it to Laurestine and Ayanna Hatchett in 1984.

On June 26, 1995, Plaintiffs filed their First Amended Complaint for Injunctive Relief requesting that the Government be enjoined from levying or seizing mortgage payments due to the Hatchetts from Ernest and Hermetha Jarrett on property located on 6300 Cyclone Road, Otter Lake, Michigan. This request was prompted by Plaintiff receiving a notice of levy against Elbert Hatchett's interest in real property located at 6300 Cyclone Road, Otter Lake, Michigan. Plaintiffs claim, and the Government agrees, that the Hatchetts owned this property as tenants by the entirety until they sold it to the Jarretts on August 19, 1991. The Jarretts granted a mortgage to the Hatchetts dated August 18,

1991. The Hatchetts claim they own the mortgage as tenants by the entirety.

The Government issued a trial subpoena, which the Hatchetts objected to on the ground that it raised issues not within the pleadings. As a result, the Government filed a Motion to Amend its Answer to the Verified First Amended Complaint on April 30, 1996, seeking to add a theory of fraudulent conveyance. In its Memorandum Opinion and Order, dated February 28, 1997, this Court granted the Hatchetts' Motion to Quash Trial Subpoena and reversed Magistrate Judge Donald A. Scheer's Orders which had granted the Government's motion to add the fraudulent conveyance defense. The Court based this opinion on a number of reasons: 1) the Government lacked standing to pursue a fraudulent conveyance defense given that the bankruptcy trustee did not pursue this allegation;[1] 2) laches prevented the Government from filing the affirmative defense; 3) and res judicata barred the issue because a settlement had been reached and no appeal was taken. As to the Motion to Quash, the Court agreed with Plaintiffs' assertion that information relating to the respective incomes of the Hatchetts was irrelevant. The Court ruled:

Given that the current rule in the Sixth Circuit is that a federal tax liability of one spouse does not attach to the property held by the entireties, the information sought by the

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[1] Plaintiffs Elbert Hatchett had filed for bankruptcy under Chapter 11, which was later converted to Chapter 7. Although the bankruptcy trustee filed a fraudulent conveyance action against Mr. Hatchett, the trustee did not pursue the action, and on April 2, 1993, the bankruptcy judge entered an Order Approving Settlement Agreement and Mutual Release. No appeal was taken from this order.

United States regarding the entireties properties is not relevant. Also, the Court finds that the trial subpoena is a belated discovery request filed long after discover has been completed. The Court further finds that the requested information would be overly burdensome to the Plaintiffs since it requests information which spans over 20 years. The Magistrate Judge erred in denying Plaintiffs' Motion to Quash on this issue.

The Government filed a motion for reconsideration of this order on March 17, 1997, which the Court later denied in an order filed April 9, 1998.

B. The Reinstatement Petition

The Government's Motion for Recusal stems from the April 22, 1997, petition for reinstatement to the bar of this court filed by Plaintiff Elbert Hatchett. See In re: Elbert Hatchett, Misc. Case No.91-X-74656. Plaintiff Hatchett had been suspended from practice in this court as a result of his suspension by the Michigan Attorney Discipline Board which began September 27, 1991. The suspension by the Michigan Attorney Discipline Board was for a period of 120 days and occurred as a result of Elbert Hatchett's April 1989 conviction in this court on four misdemeanor counts of wilful failure to pay income taxes. The order of suspension in this court was entered on October 7, 1992. Petitioner was reinstated to practice in the Michigan courts on October 18, 1993, following a hearing where he was required to establish by clear and convincing evidence a number of factors bearing on

his ability and fitness to practice law in the State of Michigan.[2]

Reinstatement to practice before the Michigan state courts does not automatically result in reinstatement to practice before this federal court. *See* E.D. Mich. Local R.

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[2] In 1993, Michigan Rules of Court 9.123(B) read as follows: (B) Revocation or Suspension More than 119 days. An attorney whose license to practice law has been revoked or suspended for more than 119 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) he or she can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an offer of the court;

(8) he or she is in compliance with the requirements of subrule (C) if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

83.22(g)(3). Attorneys are required to petition for reinstatement. Upon such petition a three judge panel is appointed by the Chief Judge to consider the petition. On March 24, 1997, such a panel granted Plaintiff's Petition for Limited Reinstatement affording him the opportunity to handle one criminal matter in this court. During the hearing on the limited petition, Plaintiff requested full reinstatement. The panel refused to consider full reinstatement because full reinstatement was not properly before it.[3]

On April 22, 1997, Plaintiff petitioned this federal court for full reinstatement. On May 7, 1997, Chief Judge Anna Diggs Taylor appointed a panel of three different judges to hear the petition for full reinstatement. The panel consisted of Judges Horace Gilmore, Judge Bernard Friedman, and Judge Denise Page Hood. In the usual course and practice of this court, Chief Judge Taylor's order referred the petition to the Grievance Administrator of the Michigan Attorney Grievance Commission for investigation and the Grievance Administrator was directed to send the Grievance Commission's investigative reports and transcripts of its reinstatement proceedings to the three judge panel and the Clerk of this court. The record before the Michigan Attorney Grievance Commission is voluminous.

On May 29, 1997, prior to the first hearing on Plaintiff's reinstatement petition, this court set a status conference for June 16, 1997, in the wrongful levy action. The first hearing on Plaintiff's reinstatement petition was held on June 12, 1997. Prior to the hearing date, this judge informed the other members of the three judge panel of the civil litigation

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[3] This Judge was not a member of the panel who granted Elbert Hatchett's petition for limited reinstatement.

pending in her court between the Government and the Hatchetts. The other judges agreed to proceed. At the onset of this hearing, this Judge disclosed that the instant civil lawsuit was pending before her. No one objected to her presence as a member of the panel. During this first hearing the court did question the attorney from the Grievance Commission regarding the attorney's comments regarding the Plaintiff's financial disclosure which the attorney had indicated had been an issue at the hearing on the limited reinstatement petition. The hearing was continued to June 19, 1997.

A status conference in this wrongful levy case was held as scheduled on June 16, 1997, and the parties were granted leave to file cross motions for summary judgment on the issues remaining in the case. These motions, along with the Government's Motion to Dismiss for Lack of Jurisdiction, were filed the end of July 1997, and set for a September 29, 1997, hearing date.

The hearing on the petition for reinstatement resumed on June 19, 1997. On September 17, 1997, the majority of the three judge panel denied Elbert Hatchett's Petition for Reinstatement in a written order. Judge Hood dissented in a separately written order issued the same date.

C. Subsequent Procedural History

On September 29, 1997, a hearing was held on the parties' cross-motions for summary judgment in this wrongful levy case. This Court, by notice dated January 17, 1998, set a final pretrial conference in this matter for March 23, 1998, and a trial date of March 24, 1998.

On March 23, 1998, the Court ruled on the record that it would issue an order which would deny the Government's

Motion to Dismiss for Lack of Jurisdiction and its Motion for Reconsideration of the Court's February 28, 1997, order which granted the Hatchetts' Motion to Quash, and denied the Government's motion to add a defense of fraudulent conveyance. The Court also stated that it would grant in part and deny in part the Government's and the Hatchetts' cross-motions for summary judgment. Specifically, that Court stated that the Government could not pursue its lien tracing theory and nominee/alter ego theory, and reiterated that it could not pursue its fraudulent conveyance theory, but stated that it could pursue its instantaneous lien theory which, in essence, allowed the Government to seek half of the proceeds of any properties which were conveyed out of the tenancy by the entirety. The parties were to return for a conference on March 24, 1998, with a joint final pretrial order consistent with the ruling.

During the March 24, 1998, conference, the Government asserted that Elbert Hatchett's probation was to be violated in an ongoing proceeding before another judge. This Court advised the Government that it was unaware of this violation, as it had sat on the three judge panel which considered Mr. Hatchett's petition for reinstatement, and had been advised that Mr. Hatchett was in compliance with probation. The Government claims this was the first notice it received of this Court's participation on the panel. This *1044 was the first notice this Judge gave to the Government. As it turns out, Mr. Hatchett's probation was not violated.

The parties returned on March 25, 1998, and the Government made an oral motion for recusal. The Court denied the oral motion, but indicated that the Government would be afforded an opportunity to file a written motion after it had reviewed the record with respect to Plaintiff's Petition for Reinstatement. At the request of the Government, an

evidentiary hearing was held to allow the Government the opportunity to proffer the evidence it would have relied on to support its claims of fraudulent conveyance, lien tracing, and nominee ownership which claims had been disallowed by this Court.

The parties requested that the Court stay the wrongful levy action pending the decision in Craft v. Commissioner, 140 F.3d 638 (6th Cir.1998), which was on appeal to the United States Court of Appeals for the Sixth Circuit.[4] On March 31, 1998, this Court ordered the wrongful levy action stayed pending the decision in Craft. Ironically, the Sixth Circuit decided Craft the next day, on April 1, 1998. On April 8, 1998, this Court entered orders denying the Government's Motion for Reconsideration of the Order striking the fraudulent conveyance defense and denying the Government's Motion to Dismiss for Lack of Jurisdiction, which the Court had previously denied on the record. The Court allowed the parties to submit supplemental briefs on the cross- motions for summary judgment, limited to the issue of what effect the Craft decision would have on the wrongful levy action, and held it opinion in abeyance. The Court set a hearing date of April 23, 1998, for supplemental oral arguments which was later adjourned to May 20, 1998. The parties submitted supplemental briefs on April 17, 1998.

The Government then filed this Motion for Recusal on April 27, 1998, to which Plaintiffs have filed a response. No oral arguments were held on this matter; however, the supplemental oral arguments relative to the Craft decision was held on May 20, 1998.

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[4] Now published as *Craft v. United States*, 140 F.3d 638 (6th Cir.1998).

II. MOTION FOR RECUSAL

A. Standard of Review

The Government claims this Court must disqualify itself pursuant to 28 U.S.C. § 455(a) and § 455(b)(1). Section 455(a) provides, "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This standard is not based "on the subjective view of a party." *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251 (6th Cir.1989) (*quoting Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir.1988), *cert. denied*, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989)). In determining whether to recuse herself, a judge must apply an objective standard and recuse herself if a reasonable, objective person, knowing all of the circumstances, would question the judge's impartiality. *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir.1990). "What matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

Pursuant to section 455(b)(1) a justice, judge, or magistrate of the United States shall disqualify herself if she has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). Under this standard, a judge must actually hold a bias or prejudice or have personal knowledge of the disputed facts. *See Liteky*, 510 U.S. at 552-53, 553 n. 2, 114 S.Ct. 1147 (distinguishing between subjective bias or prejudice proscribed by § 455(b)(1) and the objective appearance of bias or prejudice proscribed by § 455(a)).

Both 28 U.S.C. § 455(a) and § 455(b)(1) are subject to the extrajudicial source doctrine, which requires that the personal knowledge of the disputed facts or the information which would cause a reasonable person to question impartiality be obtained by the judge from an extrajudicial source. *Liteky*, 510 U.S. at 553, 114 S.Ct. 1147. The extrajudicial source doctrine was first annunciated in United *States v. Grinnell*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The Court in *Liteky* explained that *Grinnell*,

> clearly meant by "extrajudicial source" a source outside the judicial proceeding at hand-which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge...

Liteky, 510 U.S. at 553, 114 S.Ct. 1147.

B. Discussion

1. 28 U.S.C. § 455(b)(1)

The Court first addresses the Government's argument that during Elbert Hatchett's reinstatement hearing this Court obtained personal knowledge of the disputed facts in the instant wrongful levy action. The Court accepts the Government's argument that the reinstatement hearing was an extrajudicial proceeding, in that it was a separate proceeding from the wrongful levy action which is currently before the Court. The Court disagrees, however, with the Government's contentions that the Court "obtained personal knowledge of facts relevant to this proceeding" and was "exposed" to "evidence directly relevant in this case," including the credibility of Elbert Hatchett. (Def. Br. at 13, 14.)

The Government claims the Court obtained such facts as Plaintiffs' position that the Government is wrongfully levying against their properties and that Elbert Hatchett has made a full disclosure of his resources to the Government. This Court did not obtain the information regarding the wrongful levy from the 1997 reinstatement proceedings, but rather became aware of Plaintiffs' position that the levy by the Government against their properties was wrongful when Plaintiffs filed their Complaint and Amended Complaints in 1994 and 1995, respectively. The whole basis of the Verified Amended Complaint filed in this lawsuit is the Hatchetts' allegation of wrongful levy against certain properties by the IRS.

In the petition for reinstatement, the issue of financial disclosure was whether Elbert Hatchett had made a sufficient disclosure of his finances to the Probation Department of the United States District Court for the Eastern District of Michigan for the purpose of the Probation Department determining a restitution payment schedule. It is not clear to this Court that Plaintiff's ability to pay, his overall financial condition, or his disclosure to the Government, or lack thereof, of his finances are questions this Court will consider in the cross-motions for summary judgment, nor would they have been relevant for trial.

The Government claims that this Court's dissenting opinion in the reinstatement proceeding was based on Plaintiff's unsworn, self-serving statements that he made full disclosure of his financial condition to the IRS and was in compliance with his restitution order. The Government is mistaken. In support of its position, the Government relies on one sentence in this Court's dissenting opinion which reads: [Elbert Hatchett] is apparently in full compliance with the terms and conditions of his probation, including monthly

payment of restitution at a rate set by the Probation Department of this Court.

In re Elbert Hatchett, Misc. Case No. 91-X-74656 (Docket No. 36, Dissenting Op. p.2). The Government also suggests that this Court's questioning of the attorney for the Michigan Attorney Grievance Commission indicated that the Court accepted Mr. Hatchett's representation that he had made full disclosure to the IRS, and that disclosure would be a substitute for full disclosure to the three judge panel. The questions proceeded as follows:

> MS. BULLINGTON: Again, I would just indicate, I believe at the last federal proceeding that the Court did express a concern that Mr. Hatchett make a full written disclosure of assets and liabilities in order to enable this body to make and consider determination whether Mr. Hatchett was complying in good faith with attempting to pay off his federal tax liabilities.
>
> JUDGE HOOD: Can I ask you a question about that? When they make the representation that such a disclosure be made for purposes of making a settlement offer to the IRS do you think that such a disclosure was not made to them?
>
> MS. BULLINGTON: I have no idea whether or not it was made to the IRS or not. The IRS is not obviously this court. And the concern--
>
> JUDGE HOOD: My question was whether or not you believe whether or not they made such a disclosure to the IRS?

> MS. BULLINGTON: I have no information on which I could reply to that because as this court is aware there is strict confidentiality provisions that the IRS operates under, and there just be no way to us [sic] finding out that information. And, again, the IRS is a separate body from this court, and I thing that this court is entitled to that knowledge.
>
> JUDGE HOOD: Thank you.

(Hearing on Reinstatement, June 12, 1997, pp. 23-24.) The questions merely asked whether or not the IRS thought Mr. Hatchett had made a full disclosure to IRS. Nothing in this colloquy indicates that the court is making an overall determination of Mr. Hatchett's credibility, and much less on any issue related to the civil proceeding involving the alleged wrongful levy.

As to this Court's dissent which stated Mr. Hatchett was in compliance with the restitution order, the panel received information from Elbert Hatchett's Probation Officer that he had satisfactorily disclosed to the Probation Officer his financial condition. The Probation Officer set a payment schedule based on what the Mr. Hatchett suggested he could pay. While the Court might agree that $750.00 on an $8,000,000.00 restitution order may be unsatisfactory to the IRS, that was not a matter for the three judge panel to determine. The panel was charged with deciding whether the petitioner has demonstrated by clear and convincing evidence, "that he or she has the moral qualifications, competency and learning in the law to practice before this Court, and that his or her resumption of the practice of law would not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest." E.D. Mich. L.R. 83.22(g). The panel was to determine if Mr.

Hatchett was in compliance with the conditions of his probation, not what the conditions of the probation should be. Those conditions were set by the sentencing judge. The judgment in Plaintiff Hatchett's criminal action required Mr. Hatchett to serve four consecutive sentences of one year imprisonment, with the last year suspended in lieu of five years probation, to pay fines on several counts, and to pay all back taxes during the period of probation. The judgment does not set forth a payment schedule for the fines or taxes. The schedule was set by Mr. Hatchett's probation officer, as evidenced by the judgment which was included in the Michigan Grievance Commission materials. It did not require, as suggested by the Government, approval by the IRS or the sentencing judge, although approval by the sentencing judge may be inferred.

The Government also argues that while "Your Honor was accepting as true Hatchett's representation as to his financial statutes in the reinstatement proceeding," (Def. Brief at 14-15), the Court had before it the Government's Motion for Reconsideration of the Court's order overruling the magistrate judge's decision to allow the Government to amend its answer and for subpoena of the Hatchetts' financial records. The Motion for Reconsideration raised no new issues, and was denied therefore pursuant to Eastern District of Michigan Local Rule 7.1(h)(3). This Court is stretched to conceive how upholding a ruling, articulated and written in opinion form prior to the reinstatement proceedings, shows actual bias or the appearance of impropriety. Nor does the Court see that its decision was tainted by exposure during the reinstatement hearing to knowledge pertinent to the motion for reconsideration. This is especially true since the Court did not rely on Plaintiff Hatchett's unsworn statements at the reinstatement hearing. Mr. Hatchett's credibility at the reinstatement proceeding is just not in issue with respect to the

decisions the Court made or would have to make on the issues of wrongful levy, or the Government's theories of fraudulent conveyance, lien tracing, nominee, and instantaneous lien. The Court's rulings on the Government's theories rest solely on issues of law, not facts.

2. 28 U.S.C. § 455(a)

The Government also argues the Court should recuse itself pursuant to 28 U.S.C. § 455(a) which provides that a judge should disqualify herself if a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir.1993). The Court reiterates that this is an objective, standard, not to be based on the subjective view of the parties. *Wheeler*, 875 F.2d at 1251. Moreover, as the Supreme Court further explained:

> First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion.... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky, 510 U.S. at 555, 114 S.Ct. 1147.

The Government argues that the Court may reasonably be viewed as lacking impartiality because she dissented from the ruling of two other judges. The Government cites no basis upon which a reasonable person knowledgeable in all the facts might so conclude. Instead, the Government once again inaccurately relies upon the its impression that in order for this Court to find Mr. Hatchett in compliance with his payment of $750.00 per month on a $8,000,000, restitution amount, the Court must conclude that the restitution schedule is appropriate, as opposed to whether or not Mr. Hatchett abided by the schedule set by the Probation Department by making his monthly payments. The Government reiterates that the IRS did not approve the order, and again the Court reiterates that whether or not the victim, the IRS, agreed to or approved the restitution order was not an issue for the three judge reinstatement panel, but rather was an issue for those involved in the setting of the restitution payment schedule.

The Government has failed to support its argument that a reasonable person knowledgeable in all the facts would reasonably question the impartiality of this Court. Nothing in this Court's participation on the three judge panel, nor its dissent, nor any rulings on the wrongful levy action exhibit deep-seated favoritism toward Mr. Hatchett, nor any antagonism against the Government.

3. Clarification of Facts

The Government in its briefs takes liberties with the facts. A few inaccuracies not already noted are worth noting separately. It is just inaccurate that the Court advised the other members of the three judge panel of the wrongful levy action during the first hearing on the reinstatement. The Court, in

fact, advised the other members of the panel of the case pending on her docket at the time the petition was set for hearing. Of course counsel would not know this because it was a part of the three judge panel proceedings not preserved on the record. Both Judge Gilmore and Judge Friedman were aware of the Hatchetts' pending civil action before taking the bench on June 12, 1997.

It is true that the Court failed to directly inform the Assistant United States Attorneys assigned to this case of the petition for reinstatement. However, the United States Attorney for the Eastern District of Michigan was directly informed, a notice of the Petition for Reinstatement was advertised, and the public invited to respond. Hindsight might suggest that a better action would have been for the Court to directly notify the assigned counsel. However, this does not constitute error, nor require disqualification.

The Government also suggests that because this court dissented and would have favored Mr. Hatchett's reinstatement, the Court is not impartial. Yet, Mr. Hatchett's reinstatement could have resulted in increased income to him, and thereby increased repayment of his restitution. Although the Government concludes that the Court based its dissenting opinion on Mr. Hatchett's statements at the hearing on the petition, the record before the Michigan Grievance Commission conclusively supports Mr. Hatchett's ability to practice law. At issue was only the concern of having a person serving probation and appearing generally as an attorney in the same court. The majority wrote, "This panel also finds that it is detrimental to the integrity and standing of the bar and is not in the public interest to reinstate Mr. Hatchett to practice before this court during the time that he is on probation to this court for a serious offense." *See In re Elbert Hatchett, Misc. Case* No. 91-X-74656 (Docket No. 36,

Majority Op. p.2). The question of Mr. Hatchett's restitution payment schedule was only raised to determine if he was in compliance with the schedule and his restitution order.

The court finds that there is not sufficient basis for disqualification in this matter. The Government's motion for recusal is DENIED.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

The parties seek summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether there are issues of fact requiring a trial, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (*quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). A "material" fact exists if there is a "dispute over facts that might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248, 106 S.Ct. 2505.

The moving party has the initial burden of showing there is no genuine issue of material fact. *Celotex Corp. v. Catrett*,

477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment must be entered if the nonmoving party fails to provide sufficient evidence on an essential element to that party's case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. The nonmoving party must present more than a mere scintilla of evidence and "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 252, 106 S.Ct. 2505 (internal citation omitted). If the nonmoving party fails to present evidence that opposes the moving party, the evidence submitted by the moving party will be taken as true. *Id.* at 248-49, 106 S.Ct. 2505.

B. Analysis

Plaintiffs brings this action pursuant to 26 U.S.C. § 7426, which allows a person or entity other than the delinquent taxpayer to bring a civil action for wrongful levy against the United States. 26 U.S.C. § 7426; *Ames Investment, Inc. v. United States of America*, 819 F.Supp. 666, 670 (E.D.Mich.1993). In a wrongful levy action, the plaintiff bears the initial burden of showing that he or she has an interest in the property, and that the IRS' levy on that property is wrongful because it assessed the tax on a different person or entity. *Ames Investment, Inc.*, 819 F.Supp. at 670 (*citing Morris v. United States Dep't of Treasury*, 813 F.2d 343, 345 (11th Cir.1987); *William L. Comer Family Equity Trust v. United States*, 732 F.Supp. 755, 759 (E.D.Mich.1990)). Once the plaintiff demonstrates this interest, the burden shifts to the Government to prove a nexus between the taxpayer and the property levied upon by substantial evidence. *Id. See also Nelson v. United States*, 821 F.Supp. 1496, 1500 (M.D.Ga.1993). The ultimate burden

remains with the plaintiff, however, to convince the court that the levy should be overturned. Nelson, 821 F.Supp. at 1500. In order to prevail in this wrongful levy action, Plaintiffs must meet a two- prong standard. First, Plaintiffs must prove that the property is owned by another person or entity, and not by the taxpayer, Elbert Hatchett. Dubinsky v. United States, 62 F.3d 182 (7th Cir.1995). Second, if the property is held by an entity--here, entirety property--rather than the individual taxpayer, the legal issue must be resolved as to whether the Government may validly assert a lien on the property. *See Cole v. Cardoza*, 441 F.2d 1337 (6th Cir.1971).

As to the first prong, the four properties and the mortgage on the fifth property upon which the Government levied taxes is currently owned either by the Hatchetts' as tenants by the entirety or by Elbert Hatchett's wife, Laurestine Hatchett. Accordingly, the properties are not owned by Elbert Hatchett, the individual taxpayer.

The gravamen of the parties' dispute arises from the second prong--whether the Government may levy on these properties. The Internal Revenue Code provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. The lien generally arises when the IRS makes the assessment, and continues until the taxpayer's liability "is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322; *Craft v. United States*, 140 F.3d 638, 641 (6th Cir.1998).

Because federal tax law creates no property rights but merely attaches federal consequences to rights created under state law, state law determines the nature of the legal interest

which the taxpayer had in the property. *Id.* (*citing United States v. Bess*, 357 U.S. 51, 55, 78 S.Ct. 1054, 2 L.Ed.2d 1135 (1958); Aquilino v. United States, 363 U.S. 509, 513, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960); *Morgan v. Commissioner,* 309 U.S. 78, 82, 60 S.Ct. 424, 84 L.Ed. 585 (1940)). *See also United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343, 347-48 (6th Cir.1990), cert. denied, 499 U.S. 947, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991); *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir.1971). " '[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *Id.* *(quoting United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S.Ct. 2919, 86 L.Ed.2d 565 (1985) and *Bess*, 357 U.S. at 56-57, 78 S.Ct. 1054). "Under federal tax law, the government's tax liens attach to every interest in property a taxpayer might have, regardless of whether that interest is less than full ownership or is only one among several claims of ownership." Id. (citing United States v. Safeco Ins. Co. of America, Inc., 870 F.2d 338, 341 (6th Cir.1989); National Bank of Commerce, 472 U.S. at 725, 730, 105 S.Ct. 2919)..

The parties agree that at the time of the tax levy the property at 79 Bloomfield was owned exclusively by Elbert Hatchett, and Plaintiffs have stipulated to withdrawing the wrongful levy action with respect to this property.[5] The remaining property is held by the Hatchetts as tenants by the entirety. Under Michigan law, tenants by the entirety, who must be husband and wife, hold under a single title with right

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[5] A separate order will be issued along with this Memorandum Opinion and Order regarding the 79 Bloomfield property.

of survivorship. *Craft*, 140 F.3d at 641; *Leroy Lane*, 910 F.2d at 346; *Cole*, 441 F.2d at 1343. A tenancy by the entirety can be created only by a written instrument of conveyance, which produces unity of persons, time, title, interest, and possession. *Craft*, 140 F.3d at 641 (citing *Rogers v. Rogers*, 136 Mich.App. 125, 356 N.W.2d 288, 292-93 (1984)). Neither husband nor wife acting alone can alienate any interest in the property, nor can creditors of one spouse levy upon the property. Id. at 642, 356 N.W.2d 288 *(citing Matter of Grosslight*, 757 F.2d 773, 775 (6th Cir.1985)). The creditors of one spouse cannot reach that spouse's share of proceeds from a foreclosure sale of an entireties property. Id. (*citing Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655, 62 N.W.2d 619, 623 (1954)). Divorce converts an entireties estate into a tenancy in common. *Id.* (*citing* Mich. Comp. Laws Ann. § 552.102; *United States v. Certain Real Property Located* at 2525 *Leroy Lane*, 910 F.2d 343, 351 (6th Cir.1990) ("*Leroy Lane I* ")). Spouses can also terminate an entireties estate by a joint conveyance. *See Leroy Lane I*, 910 F.2d at 351. Although the government can levy against property held as a tenancy by the entirety for nonpayment of real estate taxes on the real property itself, the government can not attach a lien to the entireties property to satisfy the personal tax liability of a single spouse. *Craft*, 140 F.3d at 642 (*citing Robbins v. Barron*, 32 Mich. 36 (1875), *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir.1971)).

The Court finds that no genuine issue of material fact exists and that *Craft v. United States*, 140 F.3d 638 (6th Cir.1998), is dispositive on the issue of whether the Government wrongfully levied on Plaintiffs' property held as a tenancy by the entirety. The Sixth Circuit unequivocally held, "Because Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that

spouse as an entireties estate." Id. at 643. The *Craft* panel specifically addressed and struck down the Government's instantaneous lien theory– the theory this Court was previously inclined to allow. The government had argued in *Craft* that when the spouses, Sandra Craft and Don Craft (the taxpayer), conveyed property out of a tenancy by entirety and into sole ownership by Sandra Craft, "the tenancy by the entirety was terminated and Don--- for a moment in time--- owned a one-half interest in the property to which the lien could attach." Id. at 643. The *Craft* court disagreed:

> Although the entireties estate was terminated upon conveyance of the Berwyck Property to Sandra, Don's interest in the property terminated at the same time. We are unaware of any precedent indicating that an entireties estate is automatically transformed into a tenancy in common as an intermediary step in the conveyance of the property.

Id. at 644. The *Craft* Court likewise held that the taxpayer did not possess a separate future interest in the property to which the levy could attach. *Id.* at 644. For these same reasons, the Government's remaining theories--1) nominee/alter ego in which the Government argued that the Jarretts who granted a mortgage to the Hatchetts on the Cyclone property are the alter egos of the Hatchetts; and 2) lien tracing in which the Government claimed it had a lien on Elbert Hatchett's money, and that money was used to pay for the properties--are likewise unpersuasive.

The *Craft* Court went on to find that because Michigan law does not allow a spouse to use the doctrine of tenancy by the entirety to defeat the rights of a judgment creditor, a fraudulent conveyance can be set aside. *Id.* (*citing* Mich. Comp. Laws § 566.19(1); *McCaslin v. Schouten*, 294 Mich.

180, 292 N.W. 696, 698 (1940); *Morris v. Wolfe*, 48 Mich.App. 40, 210 N.W.2d 16, 17 (1973)). This Court determined in its Memorandum Opinion and Order, dated February 28, 1997, that the Government could not bring a theory of fraudulent conveyance, and upheld that opinion in denying the Government's Motion for Reconsideration on April 8, 1998.

The Court finds that no genuine issue of fact exists. Plaintiffs are entitled to judgment as a matter of law that the Government wrongfully levied on the properties located at 285 West Hickory Grove, 82 Franklin Blvd., 352 South Saginaw, and 6300 Cyclone Road. The property at 79 Bloomfield is resolved by stipulation. Accordingly, the parties' cross-motions for summary judgment are granted in part and denied in part.

IV. CONCLUSION

For the reasons set forth herein,

IT IS HEREBY ORDERED that the Government's Motion for Recusal (Docket No. 86, Filed 4/27/98) is DENIED.

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment (Docket No. 55, Filed 07/28/97) is GRANTED IN PART and DENIED IN PART. Plaintiffs' Motion is GRANTED with respect to the properties located at 285 West Hickory Grove, 82 Franklin Blvd., 352 South Saginaw, and 6300 Cyclone Road, and DENIED with respect to the property located at 79 Bloomfield.

IT IS ORDERED that Defendants' Cross-Motion for Partial Summary Judgment (Docket No. 58, Filed 07/30/97) is GRANTED IN PART and DENIED IN PART. The

Government's Motion is GRANTED with respect to the property located at 79 Bloomfield, and DENIED with respect to the properties located at 285 West Hickory Grove, 82 Franklin Blvd., 352 South Saginaw, and 6300 Cyclone Road.

IT IS ORDERED that Judgment be entered this date in accordance with this order.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 00-1645

ELBERT L. HATCHETT and	)
LAURESTINE HATCHETT,	)
Plaintiffs-Appellees	)
	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant-Appellant	)
	)

MOTION TO AMEND OPINION

Comes now the United States of America, appellant herein, by and through its counsel, and respectively moves that this Court's opinion of June 4, 2003, in the above-entitled case be amended to eliminate the statement (at Slip Op. 13) that the Internal Revenue Service is entitled to sell more than the taxpayer's interest in the properties in question, or other interests to which its liens have attached, when it proceeds under the administrative sale provisions of Section 6335 of the Internal Revenue Code. In support of this motion, counsel states as follows:

1. In this case, the Service, inter alia, levied upon the interest of Elbert L. Hatchett (taxpayer) in three parcels of real estate held by Hatchett and his wife, Laurestine Hatchett, in tenancy by the entirety to satisfy his tax liabilities.

2. In an opinion entered June 4, 2003, this Court upheld both the Service's levies and its right to sell the property levied upon pursuant to the administrative sale provisions of

Section 6335 of the Internal Revenue Code. The Court's opinion further states that "the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to § 6335(c)." (Slip. Op at 13.)

3. The notice of levy in the present case only purported to levy on taxpayer's interest in the three parcels of real property. *See* Apx. 69, 191. The notice stated (Apx. 191):

> Section 6331 of the Code authorizes collection of taxes by levy on all property or rights to property of a taxpayer, except property that is exempt under Code section 6334. Therefore, under the provisions of Code section 6331, so much of the property or rights to property, either real or personal, as may be necessary to pay the unpaid balance of assessment shown, with additions provided by law, including fees, costs, and expenses of this levy, are levied on to pay the taxes and additions.

4. When the Service collects taxes by administrative levy, it can only sell the property upon which it has levied. *See United States v. Rodgers*, 461 U.S. 677, 696 (1983) ("Under 26 U.S.C. § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt property and rights to property . . . belonging to such person," i.e. the delinquent taxpayer (emphasis by the Court; internal quotation marks omitted)).

5. It is highly doubtful in our view whether I.R.C. § 6335(c), which permits indivisible "property liable to levy" to be sold, allows the Government to sell property that neither belongs to the taxpayer nor is property on which there is a lien. *See* I.R.C. § 6331(a). By contrast, through judicial foreclosure, under Section 7403 of the Internal Revenue

Code, the Government can obtain the judicial sale of property in which non-taxpayers have interests to which the tax lien did not attach. For example, where a taxpayer and another person hold real property as tenants in common, although the Service could only seize and sell the taxpayer's undivided half interest, the Government may ask a court to sell the entire parcel and compensate the taxpayer's co-owner. *See* I.R.C. § 7403(c) (the district court "may decree a sale of such property . . . and a distribution of the proceeds of such sale . . . in respect to the interests of the parties and of the United States"); *Rodgers*, 461 U.S. at 680 (Section 7403 authorizes the sale of a family homestead, in which the delinquent taxpayer had an interest, but in which the nonliable spouse of the taxpayer also had an interest).

6. At all events, the United States has never sought in this case to sell, pursuant to the administrative sale provisions of Section 6335, more than what it levied upon, namely taxpayer's interest in the three parcels in question, or interests to which its liens have attached. Accordingly, there is no need for the Court to address the question whether Section 6335(c) might allow for the administrative sale of the entire property (including the interest of the non-liable co-owner, even where the tax liens in question do not attach).

WHEREFORE, the Government requests this Court to amend its opinion of June 4, 2003, to eliminate the statement (at Slip Op. 13) that the Internal Revenue Service is entitled to sell more than the taxpayer's interest in the properties in question (unless its lien is demonstrated to attach to the interests of another person) when it proceeds under the administrative sale provisions of Section 6335 of the Internal Revenue Code.

/s/_____
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Dated: this 3rd day of July, 2003